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State responsibility

Draft articles provisionally adopted by the Drafting Committee on second reading**

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I

General principles

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

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* Re-issued for technical reasons in English, French and Spanish only.

** Incorporating the reports of the Drafting Committee at its fiftieth and its fifty-first sessions contained in documents A/CN.4/L.569 and A/CN.4/L.574 and Corrs.1 (English only), 2 (French only), 3 and 4 (Spanish only).

Article 2 [3]*

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) Is attributable to the State under international law; and

(b) Constitutes a breach of an international obligation of the State.

Article 3 [4]

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II

The act of the State under international law

Article 4 [5]

Attribution to the State of the conduct of its organs

1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State.

Article 5 [7]

Attribution to the State of the conduct of entities exercising elements of the governmental authority

The conduct of an entity which is not an organ of the State under article 4 [5] but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question.

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* The numbers in square brackets correspond to the numbers of the articles adopted on first reading.

Article 6 [8]

Attribution to the State of conduct in fact carried out on its instructions or under its direction or control

The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 7 [8]

Attribution to the State of certain conduct carried out in the absence of the official authorities

The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 8 [9]

Attribution to the State of the conduct of organs placed at its disposal by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it had been placed.

Article 9 [10]

Attribution to the State of the conduct of organs acting outside their authority or contrary to instructions

The conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, such organ or entity having acted in that capacity, shall be considered an act of the State under international law even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise.

Article 10 [14, 15]

Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement, which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 [5] to 9 [10].

Article 11

Conduct which is acknowledged and adopted by the State as its own

Conduct which is not attributable to a State under articles 4 [5], 5 [7], 6 [8], 7 [8], 8 [9], or 10 [14, 15] shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

CHAPTER III

Breach of an international obligation

Article 12 [16, 17,18]

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13 [18]

International obligation in force for the State

An act of a State shall not be considered a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14 [24]

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with what is required by that obligation.

Article 15 [25]

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV

Responsibility of a State in respect of the act of another State

Article 16 [27]

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Article 17 [28]

Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Article 18 [28]

Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(b) The coercing State does so with knowledge of the circumstances of the act.

Article 19

Effect of this Chapter

This Chapter is without prejudice to the international responsibility, under other provisions of the present articles, of the State which commits the act in question, or of any other State.

CHAPTER V

Circumstances precluding wrongfulness

Article 20 [29]

Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21

Compliance with peremptory norms

The wrongfulness of an act of a State is precluded if the act is required in the circumstances by a peremptory norm of general international law.

Article 22 [34]

Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 23 [30]

Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with its international obligations to another State is precluded if and to the extent that the act constitutes a countermeasure directed towards the latter State under the conditions set out in articles 50 [47] to 55 [48].

Article 24 [31]

Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) The occurrence of *force majeure* results, either alone or in combination with other factors, from the conduct of the State invoking it; or

(b) The State has assumed the risk of that occurrence.

Article 25 [32]

Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question had no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(a) The situation of distress results, either alone or in combination with other factors, from the conduct of the State invoking it; or

(b) The act in question was likely to create a comparable or greater peril.

Article 26 [33]

State of necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only means for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question arises from a peremptory norm of general international law;

(b) The international obligation in question excludes the possibility of invoking necessity; or

(c) The State has contributed to the situation of necessity.

Article 27 [35]

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness under this Chapter is without prejudice to:

(a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) The question of compensation for any material harm or loss caused by the act in question.

PART TWO

CONTENT OF INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I

General principles

Article 28 [36]

Legal consequences of an internationally wrongful act

The international responsibility of a State which arises from an internationally wrongful act in accordance with the provisions of Part One entails legal consequences as set out in this Part.

Article 29 [36]

Duty of continued performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30 [41, 46]

Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(a) To cease that act, if it is continuing;

(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31 [42]

Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury consists of any damage, whether material or moral, arising in consequence of the internationally wrongful act of a State.

Article 32 [42]

Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Article 33 [38]

Other consequences of an internationally wrongful act

The applicable rules of international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this Part.

Article 34

Scope of international obligations covered by this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending on the character and content of the international obligation and on the circumstances of the breach, and irrespective of whether a State is the ultimate beneficiary of the obligation.

2. This Part is without prejudice to any right, arising from the international responsibility of a State, which accrues directly to any person or entity other than a State.

CHAPTER II

The forms of reparation

Article 35 [42]

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of the present Chapter.

Article 36 [43]

Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) Is not materially impossible;

(b) Would not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 37 [44]

Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 38 [45]

Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 39

Interest

1. Interest on any principal sum payable under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 40 [42]

Contribution to the damage

In the determination of reparation, account shall be taken of the contribution to the damage by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

CHAPTER III

Serious breaches of essential obligations to the international community

Article 41

Application of this Chapter

1. This Chapter applies to the international responsibility arising from an internationally wrongful act that constitutes a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation, risking substantial harm to the fundamental interests protected thereby.

Article 42 [51, 53]

Consequences of serious breaches of obligations to the international community as a whole

1. A serious breach within the meaning of article 41 may involve, for the responsible State, damages reflecting the gravity of the breach.

2. It entails, for all other States, the following obligations:

(a) Not to recognize as lawful the situation created by the breach;

(b) Not to render aid or assistance to the responsible State in maintaining the situation so created;

(c) To cooperate as far as possible to bring the breach to an end.

3. This article is without prejudice to the consequences referred to in Chapter II and to such further consequences that a breach to which this Chapter applies may entail under international law.

PART TWO *bis**

THE IMPLEMENTATION OF STATE RESPONSIBILITY

CHAPTER I

Invocation of the State responsibility of a State

Article 43 [40]

The injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) That State individually; or

(b) A group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) Specially affects that State; or

(ii) Is of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned.

Article 44

Invocation of responsibility by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(b) What form reparation should take.

Article 45 [22]

Admissibility of claims

The responsibility of a State may not be invoked if:

(a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(b) The claim is one to which the rule of exhaustion of local remedies applies, and any available and effective local remedy has not been exhausted.

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* The Commission has set aside Part Three (Settlement of Disputes) of the draft articles adopted on first reading. Hence the gap.

Article 46

Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(a) The injured State has validly waived the claim in an unequivocal manner;

(b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 47

Invocation of responsibility by several States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 48

Invocation of responsibility against several States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(a) Does not permit any injured State to recover, by way of compensation, more than the damage suffered;

(b) Is without prejudice to any right of recourse towards the other responsible States.

Article 49

Invocation of responsibility by States other than the injured State

1. Subject to paragraph 2, any State other than an injured State is entitled to invoke the responsibility of another State if:

(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest;

(b) The obligation breached is owed to the international community as a whole.

2. A State entitled to invoke responsibility under paragraph 1 may seek from the responsible State:

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30 [41, 46];

(b) Compliance with the obligation of reparation under Chapter II of Part Two, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 44, 45 [22] and 46 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

CHAPTER II

Countermeasures

Article 50 [47]

Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.

2. Countermeasures are limited to the suspension of performance of one or more international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall as far as possible be taken in such a way as not to prevent the resumption of performance of the obligation or obligations in question.

Article 51 [50]

Obligations not subject to countermeasures

1. Countermeasures shall not involve any derogation from:

(a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) Obligations for the protection of fundamental human rights;

(c) Obligations of a humanitarian character prohibiting any form of reprisals against persons protected thereby;

(d) Other obligations under peremptory norms of general international law;

(e) Obligations to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

2. A State taking countermeasures is not relieved from fulfilling its obligations under any applicable dispute settlement procedure in force between it and the responsible State.

Article 52 [49]

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 53 [48]

Conditions relating to resort to countermeasures

1. Before taking countermeasures, the injured State shall call on the responsible State, in accordance with article 44, to fulfil its obligations under Part Two.

2. The injured State shall notify the responsible State of any decision to take countermeasures, and offer to negotiate with that State.

3. Notwithstanding paragraph 2, the injured State may take such provisional and urgent countermeasures as may be necessary to preserve its rights.

4. Countermeasures other than those in paragraph 3 may not be taken while the negotiations are being pursued in good faith and have not been unduly delayed.

5. Countermeasures may not be taken, and if already taken must be suspended within a reasonable time if:

(a) The internationally wrongful act has ceased, and

(b) The dispute is submitted to a court or tribunal which has the authority to make decisions binding on the parties.

6. Paragraph 5 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 54

Countermeasures by States other than the injured State

1. Any State entitled under article 49, paragraph 1 to invoke the responsibility of a State may take countermeasures at the request and on behalf of any State injured by the breach, to the extent that that State may itself take countermeasures under this Chapter.

2. In the cases referred to in article 41, any State may take countermeasures, in accordance with the present Chapter in the interest of the beneficiaries of the obligation breached.

3. Where more than one State takes countermeasures, the States concerned shall cooperate in order to ensure that the conditions laid down by this Chapter for the taking of countermeasures are fulfilled.

Article 55 [48]

Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

PART FOUR

GENERAL PROVISIONS

Article 56 [37]

Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law.

Article 57

Responsibility of or for the conduct of an international organization

These articles are without prejudice to any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58

Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting in the capacity of an organ or agent of a State.

Article 59 [39]

Relation to the Charter of the United Nations

The legal consequences of an internationally wrongful act of a State under these articles are without prejudice to the Charter of the United Nations.